No. 22341

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. J. BUMB,

Appellant,

vs.

PACIFIC TELEPHONE & TELEGRAPH CO.,

Appellee.

On Appeal From
The United States District Court
For the Central District of California

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

I

Since the telephone numbers in question were in the rightful possession of the Debtor upon the filing of the Chapter XI Petition, the Bankruptcy Court had summary jurisdiction to issue the contested restraining order.

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II

The contract which the Receiver seeks to assume or reject is severable and separate from the Telephone Company's contract with the Debtor, is not affected by the Receiver's refusal to pay pre-bankruptcy charges and, consequently, is not terminable by the Telephone Company.

III

The doctrine of contract of adhesion applies to the Telephone Company. The Telephone Company's tariffs which seek to define what is and what is not "property" and which seek to establish a procedure for supersedure are unreasonable and discriminatory.

ARGUMENT

I

SINCE THE TELEPHONE NUMBERS IN QUESTION WERE IN THE RIGHTFUL POSSESSION OF THE DEBTOR UPON THE FILING OF THE CHAPTER XI PETITION, THE BANKRUPTCY COURT HAD SUMMARY JURISDICTION TO ISSUE THE CONTESTED RESTRAINING ORDER.

The Telephone Company concedes the summary jurisdiction of the Bankruptcy Court to adjudicate rights to property in its actual or constructive possession, but urges that where the property is in the possession of a third party who asserts a

bona fide adverse claim to it a plenary suit is the only remedy; and then asserts that the Receiver has never suggested that the Telephone Company's claim is frivolous (Appellee's Ans. Br. pp. 7 and 8).

The fallacy of this argument is that the frivolous nature of the Telephone Company's claim has been the very subject of this proceeding from its inception. Secondly, if as the Telephone Company contends, a telephone number is not property, then as to what has the Telephone Company been asserting its adverse claim?

The Receiver's Opening Brief has clearly demonstrated that a telephone number is property, both under the California and Federal decisions relating thereto, and it now appears that the Telephone Company concedes that a telephone number is property. That the telephone numbers in question were in the possession of the debtor and, consequently, the Receiver, at the time of the within Chapter XI proceeding, is undisputed and was so found both by the Referee and the District Judge (R. 104, 286).

As to possession of a telephone number, there are only two alternatives. The first is that the telephone number is held "in inventory" by the telephone company, waiting to be assigned to a subscriber. The second is that the number has been assigned to a subscriber, and is possessed and used by him. The numbers in question were fully possessed by the

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debtor on the date of filing of its Chapter XI Petition and were in no way possessed by the Telephone Company since anybody dialing the numbers assigned to the debtor would get the debtor and no other person. Since the test of summary jurisdiction is possession rather than title, the Referee in Bankruptcy was correct in issuing the injunction. 2 Collier on Bankruptcy, 467-468 (14th Ed.); Wuchner v. Goggin, 175 F. 2d 261, 265 (C.A. 9, 1949).

To bolster its ill-founded attack upon the summary jurisdiction of the Bankruptcy Court, the Telephone Company refers to Slenderella Systems of Berkeley v. The Pacific T & T Co., 286 F. 2d 488 (C.A. 2, 1961), wherein, at page 490, the Court says that:

> "The license to use a specific telephone number does not amount to the possession required as a basis for summary jurisdiction."

The use of the word "license" by the Court of Appeals for the Second Circuit is an inappropriate choice of language, since the Telephone Company does not grant a "license." Licenses are of two classes; those issued by the public through its governmental bodies and agencies and those given by private persons. The licenses from the public are those granted by a state or its political subdivisions as a means of regulation or taxation of privileges and occupations, whereas the licenses given by private persons relate only to copyrights, patents,

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waters and water rights and real property. 31 Cal. Jur. 2d 209; 33 Am. Jur. 398. The Telephone Company is, therefore, making a sale to its subscribers of a telephone number for their unlimited use and, during that period of use, that telephone number is completely consumed by the subscriber and cannot be used by anyone else, including the Telephone Company. As noted in 2 Bouvier's Law Dictionary, 2572 (3d Ed.), "[t] he right of using a thing indefinitely is an essential quality of absolute property, without which absolute property can have no legal existence. Use is the real sign of property."

Thus, "property" is "...nomen generalissimum and includes everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value, or which goes to make up one's wealth or estate ... and extends to every species of valuable right and interest ...". Globe Indemnity Co. v. Bruce, 81 F. 2d 143, 150 (C.A. 10, 1935). Thus, in Globe, an Indian headright was held to be property and passed to the Trustee in Bankruptcy.

To support its theory that the debtor did not obtain any proprietary interest in the telephone numbers in question, the

Telephone Company cites three cases[1] for the proposition that its tariffs defining property become a part of the contract between the telephone company and the subscriber and have the force and effect of law, (Appellee's Ans. Br. p. 9). None of those cases involved the telephone company or its tariffs and only the Western Union Telegraph Company case deals with the effect of tariffs, and that case only in conjunction with the interpretation of a Federal statute, the Act of June 19, 1910 to Regulate Commerce. Further, those cases did not deal with any attempted definition of what is or what is not property, but rather with the question of tariffs regulating rates and limiting liability. The only common thread running through those cases is that in each the Court found the tariff in question to be reasonable. As noted in Appellant's Opening Brief (pp. 27-33), the tariffs in question here are far from reasonable.

Even were the tariffs in question reasonable and a part of the contract between the Telephone Company and the debtor and the Receiver, a point that we do not concede, we note that they can be affected by and must give way to the provisions and ultimate purposes of the Bankruptcy Act. As was said in Engstrom v. DeVos, 81 Fed. Supp. 854 (D. C. E. D.

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[1] Hirschemoeller v. National Ice, etc. Storage Co., 46 Cal. 2d 318, 294 P. 2d 433 (1956); J. Breuner Co. v. Western Union Telegraph Co., 108 Cal. App. 243, 291 P. 445 (1930); Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921).

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Washington, 1949):

> "Congress, however, under the Federal Constitution, has the broad power to establish uniform laws on the subject of bankruptcies. U. S. Const. Art. I, Sec. 8, Clause 4. That subject has been defined by the Supreme Court as 'the relations between an insolvent or non-paying or fraudulent debtor, and his creditors extending to his and their relief.' (Citation omitted). This broad power of Congress, when it comes into conflict with State law, is not limited to the procedural field. It may, and, in practice, frequently does, affect substantive rights as well." (81 F. Supp. at 858, 859).

We note also that the "contract provisions" sought to be enforced by the telephone company would cause a forfeiture such as is proscribed by §3275 of the California Civil Code. See also, Wuchner v. Goggin, 175 F. 2d 261 (C.A. 9, 1949).

A forfeiture results since the Telephone Company seeks to deprive the Receiver of the use of the telephone numbers requisite to the financial rehabilitation of the debtor at a time when the Receiver is willing and able to pay in full for the use of those telephone numbers. That refusal is based solely upon a desire to collect unpaid charges preferentially to the claims of other creditors; and does not result from any duty imposed

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upon the Telephone Company by its rules and regulations or by law to seek the preferential collection of those charges. Rule 11 (A)(1), of the Telephone Company's Rules and Regulations, which relates to the discontinuance of service, provides only that in the event of non-payment of a bill the telephone service "may" be discontinued. The word "may" is permissive rather than mandatory and is so defined by §14 of the California Public Utilities Act. The permissive aspect of this rule and regulation was further admitted by counsel for the Telephone Company at the hearing before the Referee in Bankruptcy on November 17, 1966. As appears at page 41 of that transcript, it is counsel's "opinion" that the Telephone Company must disconnect service in the event of non-payment of charges and that the Telephone Company "feels obligated" to do so by reason of the tariffs on file with the Public Utilities Commission. However, no legal authority has been cited by the Telephone Company which requires that it terminate service to a subscriber for non-payment of charges or that it refuse to render referral service to the Receiver under the existing facts. Instead, the Telephone Company "interprets" its rules and regulations to make and unmake "property" in an attempt to defeat the jurisdiction of the Bankruptcy Court and to impose a forfeiture upon the Receiver.

The penalty or forfeiture which the Telephone Company thus seeks to impose upon the Receiver, the Bankruptcy Court

and the debtor's creditors bears no rational relationship to the debtor's failure to pay the charges prior to bankruptcy and is, in effect, a forfeiture without regard to the actual damage suffered, especially since the Telephone Company can file a claim for its charges in the within proceeding and will be paid in full for the service rendered to the Receiver. In such a situation, the California courts are loathe to enforce the forfeiture and are quick to relieve against it. Hill v. Hearron, 113 Cal. App. 2d 763, 249 P.2d 54 (1952); Ballard v. MacCallum, 15 Cal. 2d 439, 101 P. 2d 692 (1940); Hopkins v. Woodward, 216 Cal. 619, 15 P. 2d 499 (1932).

II

THE CONTRACT WHICH THE RECEIVER SEEKS TO ASSUME OR REJECT IS SEVERABLE AND SEPARATE FROM THE TELEPHONE COMPANY'S CONTRACT WITH THE DEBTOR, IS NOT AFFECTED BY THE RECEIVER'S REFUSAL TO PAY PRE-BANKRUPTCY CHARGES AND, CONSEQUENTLY, IS NOT TERMINABLE BY THE TELEPHONE COMPANY.

The Telephone Company argues that the Receiver cannot accept the executory contract for telephone service since the Telephone Company has the right to terminate that contract and cannot be deprived of that right when that contract has been materially breached. The Telephone Company argues also that the Receiver cannot accept the executory contract without

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assuming all of its burdens, including payment in full of the past-due obligations. These arguments are predicated upon the theory that the contract for telephone service is an indivisible and entire contract which is "executory" within the meaning of §§70(b) and 313(1) of the Bankruptcy Act. (11 U.S.C. §§110[b] and 713[1]). (Appellee's Ans. Br., pp. 16-19). Such, however, is not the case.

To support its position, the Telephone Company quotes extensively from 8 Collier on Bankruptcy, 225-226 and 228 (14th Ed.) and 4A Collier on Bankruptcy 524 (14th Ed.). However, the Telephone Company overlooks the language set forth in 4 Collier on Bankruptcy 1350-1351 (14th Ed.):

> "Now, if a vendor sold merchandise to a subsequently bankrupt purchaser and conveyed unconditional title to him, but the bankrupt failed to pay any part of the purchase price the contract is certainly 'executory.' And yet it is obvious that this is not the situation in which the Trustee is . . . called upon to assume or reject. The vendor, unless secured, will file his Proof of Claim for the entire purchase price, and what the Trustee will do is possibly to object to the claim but not to reject or assume the contract."

Clearly, therefore, what Collier and the Bankruptcy Act are talking about is a contract where the performance on both

sides is wholly in futuro. In such a situation, neither party has rendered any performance and the inability of the bankrupt to perform is clearly a material breach and therefore a ground for the non-bankrupt party to terminate the contract. Such is not the situation in this case.

Here, two separate and distinct contracts exist. The first contract is that which existed between the telephone company and the Debtor. As to that contract, the Telephone Company has performed fully, whereas the debtor has not yet performed since it has not paid the Telephone Company for a portion of the services rendered by it to the debtor. As to that contract, the Telephone Company is in no different position from that occupied by any other unsecured creditor who has rendered services or sold merchandise to the debtor. That is, the Telephone Company has the right to file an unsecured claim in the within proceeding for the amounts owed to it. Further, and more basically, the contract which existed between the Telephone Company and the debtor was itself severable and divisible into monthly contracts since it provided for the Telephone Company to render telephone service to the debtor on a monthly basis for which the Telephone Company was to be paid a specified charge each month. Upon failure of the debtor to comply with the payment requirement of that contract, the Telephone Company would have the right, but not the duty, to terminate the next month's service (Telephone Company Rule

and Regulation 11[A]1). Such a situation falls clearly within the tests for a divisible contract enunciated in §266(3) of the Restatement of Contracts:

> "(a) Performance of each party is divided into two or more parts;
>
> "(b) The number of parts due from each party is the same;
>
> "(c) The performance of each part by one party is the agreed exchange for a corresponding part by the other party."

The Restatement gives the following illustration:

> "A promises to sell B and B to buy 10,000 tons of coal at $8 per ton. A promises to deliver the coal in monthly installments of 1,000 tons each and B promises to pay for each installment 10 days after delivery. The contract is divisible when each month's payment and installments are the agreed exchange."

Substituting the facts in the instant case, we have the following:

> The Telephone Company promises to provide telephone service to the debtor and the debtor promises to pay for the services at the prevailing rates. The Telephone Company further promises to service the account on a monthly basis and bill for monthly service, and

the debtor promises to pay for the amount of services used each month. The contract is divisible since each month's supply of service and payment for the same are the agreed exchange.

The second contract is that which the Receiver may seek to accept between himself and the Telephone Company. That contract is wholly executory, and is completely divisible and severable using the tests enunciated above. However, as a completely executory contract, that is, one where the performance to be rendered by each party is wholly in futuro, it falls within the requirement of mutuality set forth in the Telephone Company's answering brief as noted above. There is no lack of mutuality with regard to this contract since the record clearly establishes that the Receiver has sufficient funds on hand and is capable of paying fully all current charges billed by the Telephone Company for the services which the Receiver requests. Likewise, the Telephone Company is fully capable of rendering to the Receiver all of the services which he will request in futuro. Since such services are to be rendered to the Receiver in his capacity as such, they will be an expense of administration of the estate and will bear a priority in payment over the claims of the other creditors. Thus, the Telephone Company is assured of payment for its services as they are rendered.

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Even were the Telephone Company's argument sound and had the Receiver sought to reject what the Telephone Company terms an executory contract insofar as it provides that the numbers are subject to disconnection, he could do so under this Court's ruling in United Artists Corp. v. Strand Productions, 216 F. 2d 305 (C.A. 9, 1954). This Court there stated that when an executory portion of an agreement is severable from the rest of that agreement, rejection of that portion alone might be permitted (at page 312). Although in that case the contract involved was not severable, the contract in this case is, as noted above.

Even were the Telephone Company correct in arguing that the Receiver must pay the pre-brankruptcy charges in full in order to assume the contract for service, we note that since the telephone number is property in the possession of the Debtor the Bankruptcy Court has summary jurisdiction to enjoin disconnection, extend the time within which the Receiver may assume or reject the contract and determine when and how payment shall be made. Section 357(2) and (8) of Chapter XI (11 U.S.C. §§757[2] and [8]) permits the Plan of Arrangement to provide for the rejection of executory contracts and to contain any appropriate provisions not inconsistent with Chapter XI. Thus, if the Plan provides for assumption of the contract, and if the Telephone Company's contention as to payment is correct, the Bankruptcy Court can require payment

of the pre-bankruptcy charges as a condition precedent to approving assumption of the contract. But to condition the Receiver's request for an extension of time within which to determine whether to accept or reject the contract upon immediate payment of the pre-bankruptcy charges is unrealistic, imposes an onerous burden on the Receiver, the estate and its creditors and derogates from the salutory rehabilitative purpose of Chapter XI.

III

THE DOCRTINE OF CONTRACT OF ADHESION APPLIES TO THE TELEPHONE COMPANY. THE TELEPHONE COMPANY'S TARIFFS WHICH SEEK TO DEFINE WHAT IS AND WHAT IS NOT "PROPERTY" AND WHICH SEEK TO ESTABLISH A PROCEDURE FOR SUPERSEDURE ARE UNREASONABLE AND DISCRIMINATORY.

The Telephone Company cites J. Breuner Co. v. Western Union Telegraph Co., 108 Cal. App. 243, 291 P. 445 (1930), for the proposition that the theory of contract of adhesion is not applied to public utilities regulated by governmental agencies such as the California Public Utilities Commission (Appellee's Ans. Br. pp. 13-14). In that case, the Court absolved the Telegraph Company from liability for the misdelivery of a telegram, holding that its rules and regulations respecting the limitation of liability and the delivery of telegrams were

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reasonable. The Court, however, did not even talk about the doctrine of contract of adhesion, let alone hold that that doctrine does not apply to public utility companies.

Further, this assertion by the Telephone Company is in direct contradiction of §451 of the California Public Utilities Act which provides, in pertinent part:

> ". . . All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

As noted in our opening brief, at page 29, the doctrine of contract of adhesion is a doctrine of reasonableness. This doctrine is clearly enunciated in §451 of the California Public Utilities Act, both as to the services by a public utility and the rates to be charged therefor.

Section 451 of the California Public Utilities Act requires also that all charges demanded or received by any public utility for the services rendered or to be rendered by it must be just and reasonable and §454 of the California Public Utilities Act prohibits public utilities from raising any rate or altering any classification, contract, practice, or rule so as to result in any increase in any rate except upon a showing before the Public Utilities Commission and a finding by it that such increase is justified. If effect is given to the Telephone Company's rule for supersedure and the Receiver required to pay in full for past-due charges, the result will be:

(1) The Telephone Company will receive a preference in payment of its claim over the claims of the other unsecured creditors.

(2) These additional charges will, in effect, have been added to the rate charged the Receiver, which results in an increase in the rate to him without a showing before the Public Utilities Commission and a finding by it that the increase is justified.

(3) This impost subjects the Receiver to a prejudice and disadvantage vis-a-vis other and similar businesses utilizing the same telephone service at the normal, commission-approved rate; a practice condemned and prohibited by Section 453 of the California Public Utilities Act.

By subjecting the Receiver to such prejudice and disadvantage, the rate clearly becomes unjust and unreasonable and, as provided by §451 of the California Public Utilities Act, "[e]very unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful."

The Telephone Company's Answering Brief, at pages 14 and 15, states that the California Public Utilities Commission considers and passes upon the reasonableness of the rules and regulations governing telephone service, that it has considered and approved the rule that the subscriber has no proprietary

right in the telephone number and argues that in the absence of an application to the Public Utilities Commission to pass upon the reasonableness and propriety of a rule and regulation, its reasonableness is conclusively established.

We do not dispute that, from time to time, the California Public Utilities Commission investigates the reasonableness of the rules and regulations of the Telephone Company respecting its service and that it may change or disapprove them. However, we do dispute the Telephone Company's citation of Crocker Hotel Co. v. Pacific Telephone & Telegraph Co., decision no. 35238 (1942), 44 C.R.C. 127, 128, as standing for the proposition that the California Public Utilities Commission has approved the Telephone Company's rule and regulation stating that the subscriber has no proprietary right in a telephone number. The quotation from that case which appears on page 14 of the Telephone Company's Answering Brief is incomplete, and, as such, is incorrect. In that case, the Public Utilities Commission was considering the above mentioned rule or regulation in conjunction with the rule and regulation which provides that reasonable changes in numbers and central office equipment may be made as the company's requirements demand. The case was one in which, during wartime, the Telephone Company's existing facilities for a particular exchange were overburdened and it became necessary for the Telephone Company to make changes in its central office equipment and

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assign new numbers to telephone subscribers for the purpose of relieving the existing traffic congestion. The opinion notes that no formal hearing was held upon the complaint of the subscriber but, rather, conferences were held when, previously, the same matter was brought to the Commission's attention by informal complaint. The Commission held no further hearing in the cited case and took no new evidence. The decision states, at page 128:

> "The company's filed tariff rules provide that a patron obtains no proprietary right to a particular number assigned to his service connection and that reasonable changes in number and central office equipment may be made as the company's requirements demand. Similar rules are uniformly approved by state regulatory bodies and are essential to the maintenance of efficient service to telephone subscribers generally. The rule itself is not challenged. There is no indication that the proposed action of the company is arbitrary or capricious. It seems to be conceded that it is taken for the sole purpose of meeting exigencies arising from the greatly increased traffic demands that have arisen out of the impact of the war effort. . . ."
> (Emphasis added)

Clearly, the rule now questioned by the Receiver was not, as the above-quoted language indicates, challenged or at issue in the above-cited case. Nor, for that matter, was the Commission concerned with a question of telephone supersedure or the payment of past-due bills, but rather with wartime emergency traffic congestion.

The Telephone Company cites Morse v. Pacific Gas & Electric Co., 152 Cal. App. 2d 854, 314 P. 2d 192 (1957), for the proposition that absent a challenge of the specific rule to the Public Utilities Commission, the reasonableness thereof is conclusively established (Appellee's Ans. Br., p. 15). All that the Morse case stands for is the proposition that the Public Utility Commission's rules re disputed accounts control where the Public Utility Commission's jurisdiction is paramount (152 Cal. App. 2d 854 at 860). As noted in our Opening Brief, what is involved here is basically a disputed account, the payment of which the Telephone Company seeks to compel by its arbitrary rules relating to supersedure, the procedure for disputing bills before the Public Utilities Commission exclusively, and the rule saying that the telephone number is not property, (Appellant's Op. Br., pp. 34-40). As noted in those pages of our Opening Brief, the Bankruptcy Court is given exclusive and paramount jurisdiction to classify and adjudicate the claims of the creditors and may not surrender that jurisdiction to another court. By its own terms, therefore, the case of

Morse v. Pacific Gas & Electric Co. is inapplicable in the present case.

While we urge that a particular telephone number can have value and be "property" and that the Telephone Company's rules to the contrary are not applicable since they clearly conflict with the principles and purposes of the Bankruptcy Act and must, therefore, give way to the paramount jurisdiction of the Bankruptcy Court over the affairs of bankrupts, we do not suggest that these rules are not applicable to non-bankruptcy situations, absent affirmative action by the California Public Utilities Commission. Accordingly, the Telephone Company's fear that an adverse ruling in this case would impose upon it the odious task of keeping track of developed and developing rights in telephone numbers is unfounded (Appellee's Ans. Br., p. 15). In the normal, non-bankruptcy situation there would be no such problem, absent affirmative action by the California Public Utilities Commission. Then, certainly, the Telephone Company could not complain, except in a review to the California Supreme Court. In a bankruptcy situation the question would arise basically in operating cases where the trustee or receiver believes that the particular telephone number is of sufficient value to be classified as "property"; a question of fact to be determined in each instance by a court of law.

CONCLUSION

The Telephone Company's unreasonable and arbitrary rules must give way to the paramount jurisdiction of the Bankruptcy Court to enforce the principles and policies of the Bankruptcy Act to effect the rehabilitation of financially distressed debtors and to prevent preferential treatment among creditors.

Since the Telephone number is "property" and the telephone numbers in question were in the possession of the Debtor when its Chapter XI Petition was filed, the contested restraining order was issued properly, the decision of the District Court should be reversed and the Order of the Referee in Bankruptcy affirmed.

Respectfully submitted,

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By Nathan Markowitz

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Nathan Markowitz

NATHAN MARKOWITZ